89-1649

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD I. ISIBOR

Petitioner

Versus

BOARD OF REGENTS OF THE
STATE UNIVERSITY AND COMMUNITY
COLLEGE SYSTEM OF THE STATE
OF TENNESSEE, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME 2: PAGES 62 TO 150

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April 5, 1990

APPENDIX A.

No. 88-6286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

EDWARD I. ISIBOR,
Plaintiff-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

v.

BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, et al.,

Defendants-Appellees.

Before: NELSON and RYAN, Circuit Judges; and MEREDITH, District Judge.*

RYAN, Circuit Judge. Plaintiff Edward I. Isibor appeals the judgement for the defendants on his Title VII salary discrimination claim, 42 U.S.C. § 2000e et seq., and his § 1983 first amendment retaliatory discharge claim, 42 U.S.C. § 1983.

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* The Honorable Ronald E. Meredith, District Judge for the Western District of Kentucky, setting by designation.

On the salary discrimination claim, the district court found that plaintiff failed to prove that the reasons articulated by defendants for plaintiff's salary level were merely pretextual.

On the retaliatory discharge claim, the court found that defendants' interest in fulfilling its educational mission outweighed plaintiff's free speech interest, and that, in all events, defendants established that plaintiff would have been terminated absent the exercise of his free speech right.

We conclude that the district court did not clearly err in finding for defendants on both of plaintiff's claim and therefore, we affirm.

I.

In 1975, plaintiff, a black Nigerian-born, naturalized citizen, was hired as Dean of Tennessee State University's (TSU) School of Engineering and Technology. In 1987, he was removed as dean but remained on the TSU

faculty as tenured professor. Following his termination as dean, plaintiff filed suit for salary discrimination under Title VII, 42 U.S.C. § 2000e et seq., and for retaliatory discharge for exercising his first amendment right to free speech in violation of 42 U.S. C. § 1983[1]. Plaintiff's salary discrimination suit was based on the claim that his salary as engineering dean at TSU was less than was paid to the white male engineering dean at Memphis State University (MSU) and Tennessee Technological University (Tech). TSU, MSU and Tech are governed by defendant State Board of Regents. Plaintiff's § 1983 Retaliatory discharge claim is that he was removed as dean at TSU in retaliation for his public statements critical of TSU's management of its financial affairs.

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[1] Plaintiff also alleged that in retaliation for exercising his first amendment right, he was denied extra service pay for "grant work" he performed. The district court found the refusal to pay plaintiff the extra service pay he requested was not due to any constitutionally prohibited motive. Plaintiff did not appeal this ruling of the district court.

A.

Plaintiff sought back pay for his Title VII salary discrimination claim from the Board of Regents, its former Chancellor Roy S. Nicks, and TSU. He sought reinstatement and damages for his § 1983 retaliatory discharge claim against Board of Regent's Chancellor Thomas Garland, TSU President Otis L. Floyd, and TSU Vice President George W. Cox.

The district court ruled prior to trial that plaintiff's salary discrimination claim was restricted to the period from January 9, 1985 until June 30, 1987, the date of his removal as dean, since any Title VII claims prior to January 9, 1985 were barred by the statute of limiations. The court also held that Chancellor Nicks could be sued only in his official capacity under Title VII.

The court also held that the individual defendants, Garland, Floyd and Cox, were entitled to qualified immunity to civil

damages on plaintiff's § 1983 retaliatory discharge claim because public officials could have resonably disagreed on whether plaintiff's public statements were protected by the first amendment. The court noted, however, that since plaintiff sought injunctive relief by way of reinstatement, the § 1983 retaliatory discharge claim against the individual defendants remained.

Following a bench trial, the district court dismissed both of plaintiff's claims. The court found that plaintiff failed to prove that defendants' stated reasons for paying plaintiff a salary lower than was being paid to engineering deans at MSU and Tech were pretextual. The court also found that TSU's interest in fulfilling its educational mission outweighed plaintiff's free speech interest and, in any case, that plaintiff would have been terminated even absent his protected speech since the proofs established that plaintiff engaged in an ongoing pattern of abusive and insubordinate

behavior warranting removal from the deanship. This appeal followed.

II.

The shifting burdens of proof in a Title VII disparate treatement case require that the plaintiff must first prove by a preponderance of the evidence that a prima facie case of discrimination exists. The burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. The plaintiff must then prove by a preponderance of the evidence that the nondiscriminatory reason offered by the defendant for its action was not the true reason but a mere pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

Plaintiff contends that the district court erred in finding that plaintiff failed to prove, at step three of the process, that the nondiscriminatory reasons articulated by defendants were pretextual.

At trial, the facts established that for academic year 1984-1985 plaintiff received a salary of $58,838 while the engineering deans at MSU and Tech received salaries of $59,920 and $61,212, respectively. In 1985-1986, plaintiff received $62,638, the MSU engineering dean received $64,000 and the Tech engineering dean received $64,884. In 1986-1987, plaintiff received $65,487, the MSU engineering dean received $69,000 and the Tech engineering dean received $68,496. The TSU president's salary in 1984-85 was $59,000; in 1985-86 it was $65,000, and in 1986-87 it was $68,300.

Defendants produced evidence showing that salary recommendations for university personnel came from the universities themselves and were approved by the Board of Regents, and that there was no attempt to make the salaries uniform among the universities under the Board's control. The only salary set by the Board was the salary of the university presidents. The policy,

according to the defendants, was that the president's salary was based on the size and complexity of the university he served, and operated as a cap on all other salaries paid to personnel of that institution except the salaries of the deans of the medical or law schools. In turn, the salaries of the deans depended on the size and complexity of their department and the financial resources of the university.

Plaintiff contends that the Board repeatedly rejected TSU president's recommendations for salary increases for plaintiff, despite the fact that TSU had sufficient financial resources. The facts established that due to TSU's chronic overstaffing problems, the pool of funds from which salaries could be drawn was small. In the 1984-85 academic year, the TSU president recommended a salary increase for plaintiff that exceeded the salary the Board set for the TSU president and, therefore, the Board of Regents, at the TSU president's request,

rejected the recommendation. In 1985-86, the TSU president, upon his departure from the university, made a belated recommendation to the Board to increase plaintiff's salary. The Board referred the proposed increase to TSU's new interim president for review, but no recommendation was ever resubmitted to the Board. In 1986-87, the recommended increase in plaintiffs salary was approved by the Board.

Plaintiff contend, contrary to the defendant's claim, that the president's salary did not operate as a cap on the dean's salary since the deans of engineering at MSU and Tech made more than the president of TSU. However, the proofs show that the deans at MSU and Tech were not paid more than the presidents of their respective schools except that in 1986-87, Tech's dean of engineering made $200 more than Tech's president. The district court found the salary differential resonable since Tech had an interim president at the time. Plaintiff points out that TSU

had an interim president from 1985 through 1987. We note, however, that it was academic year 1984-85 that plaintiff's salary increase was rejected because it exceeded the salary of the TSU president. Thus, the defendant's evidence that a president's salary operated as a cap upon a dean's salary was not refuted by plaintiff.

Plaintiff also contends that the size and complexity of the engineering programs at the three universities did not affect the dean of engineering's salary since MSU's dean of engineering was paid more in 1986-87 than the engineering dean at Tech although Tech had the largest engineering program. The district court found that salaries were drawn from the revenues generated and that the MSU dean was paid more because there was a larger pool of funds available that year for salaries at MSU due to increase enrollment

Plaintiff also contends that the size and complexity of the engineering program were irrelevant since associate dean of

engineering salaries at the universities were not determined according to those criteria. The district court found that the salaries of the associate deans could not be compared since their job descriptions varied from university to university.

In sum, the district court found that plaintiff failed to prove that defendants' nondiscriminatory reasons for plaintiff's lower salary were a mere pretext. The court noted, in addition, that plaintiff was the highest paid administrator at TSU while the same could not be said for his counterparts at MSU and Tech.

We conclude that the district court's finding that plaintiff failed to prove that defendants' nondiscriminatory reasons for the salary differences among the engineering deans at MSU, TSU and Tech were mere pretext is well supported in the evidence and is not therefore, clearly erroneous. Therefore, we shall affirm the judgment for defendants on plaintiff's

Title VII salary discrimination claim.

III.

When a public employee alleges retaliation for the exercise of his constitutional right to free speech, the court must determine, first, whether the employee's comments address matters of public concern, Connick v. Myers, 461 U.S. 138, 145 (1983). If so, then the court must balance the employee's interest to speak against the employer's interest in promoting the efficient performance of its public service, Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Then the employee must show that the protected comments were a substantial or motivating factor in his discharge, while the employer has the opportunity to show by a preponderance of the evidence that it would have discharged the employee even absent the protected speech, Mt Heathy City Board of Eduction, 429 U.S. 274, 287 (1977).

The specific questions before us regarding plaintiff's retaliatory discharge claim

are 1) whether the district court erred in finding the Pickering balancing test weighed in defendants favor, and 2) whether the district court erred in finding that under the Mt Heathy causation test, the defendant established that plaintiff would have been terminated even absent the protected conduct.

The Pickering balancing test requires that a plaintiff's comments be considered in the context in which they were spoken. Connick, 461 U.S. at 152-53. Comments which adversely affect close working relationships or disrupt the maintenance of discipline or cause disharmony among coworkers may tip the balance in a defendant's favor. Anderson v. Evans, 660 F.2d 153, 158 (6th Cir. 1981).

The record shows that Dr. Isibor was outspoken on many matters, including allegations of misappropriation of funds from a General Electric grant given to TSU's School of Engineering and a one million dollar investment made by TSU through an investment

firm that went bankrupt. However, plaintiff's comments failed to exposed any wrongdoing, and indeed were made after the facts were already publicly disclosed. Plaintiff's comments on the misappropriation of grant funds came after a full investigation revealed that plaintiff's unauthorized conduct in misdirecting some of the funds to TSU Foundation, an unauthorized recipient, was the principal cause of the misappropriation. Similarly, plaintiff's comments on the one million dollar investment loss, including a radio talk show comment that a university budget department employee had misappropriated or stolen the money, came after the investment was already fully recovered.

The district court found, with ample support in the record, that plaintiff' comments were made to discredit those he felt were plotting against him. He repeatedly made reckless accusations and baseless attacks on fellow administrators. His comments were not supported by facts but reflected instead his

refusal to accept the answers given to him by TSU administrators to his inquiries. We find no error in the district court's conclusions that plaintiff's comments interfered with the efficient functioning of TSU and that defendants' interest in fulfilling its educational mission outweighed plaintiff's free speech interest. Pickering, supra.

In any case, the district court was justified in concluding that defendant's proved by a preponderance of the evidence that plaintiff would have been removed as dean even if his public statements had not been made. Mt Heathy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977). There was overwhelming proof of plaintiff's insubordinate and abusive behavior toward his supervisors, fellow faculty members and employees at TSU. Therefore, we shall affirm the judgment of dismissal of plaintiff's free speech retaliatory discharge claim.

IV.

Plaintiff also contends that the trial judge erred in failing to recuse himself under 28 U.S.C. § 455(a).[2] Plaintiff asserts that the district judge could not objectively weigh the evidence in the case since he believed plaintiff's witnesses were members of a faction who opposed the judge's order in an earlier case desegregating traditionally black TSU.

28 U.S.C. § 455(a) requires a judge disqualify himself when his impartiality may reasonably be questioned. The statute states:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. §(a).

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[2] Plaintiff concedes that 28 U.S.C. § 455(a) is his only avenue for challenging the denial of his motion for recusal since plaintiff failed to file a party affidavit as required by 28 U.S.C. § 144.

The test is an objective one and asks whether a reasonable person, knowing the surrounding circumstances, would consider the judge impartial. United States v Norton, 700 F 2d 1072, 1076 (6th Cir. 1983), cert. denied, 461 U.S. 910 (1985). The bias must stem from an extrajudicial source rather than from participation in judicial proceedings. Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986). "Impressions based on information gained in the proceedings are not grounds for disqualification in the absence of persuasive bias." In re Khan, P.S.C., 751 F.2d 162, 164 (6th Cir. 1984) (quoting United States v. Porter, 701 F.2d 1158, 1166 (6th Cir. 1983), cert.denied, 464 U.S. 1007 (1983)). A district court's decision not to recuse itself will be upheld absent an abuse of discretion. In re Khan, P.S.C., 751 F.2d 162, 165 (6th Cir. 1984); Johnson v. Trueblood, 629 F.2d 287, 290 (3rd Cir. 1980), cert. denied, 450 U.S. 999 (1981).

Plaintiff's recusal request was made after certain plaintiff witnesses testified about the racial change in TSU following the court's decision in Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd, 801 f.2d 799 (6th Cir. 1986), wherein the court approved a consent decree that included affirmative action provisions to aid in the desegregation of traditionally black TSU. Two of plaintiff's witnesses testified that they were opposed to the integration of TSU.

In response to plaintiff's recusal motion, the court reassured plaintiff that his claims would be decided based on the proofs presented. The court thought it possible that the underlying controversy in this case arose from the opposition to TSU's integration but did not believe such an issue was presented by the proofs. Plaintiff cites noting in the record to suggest that the court thought the underlying issue was one of desegregation, or that its prior desegregation order in any way affected its conclusion in

this case, and no such inference can reasonably be drawn from the court's opinion.

We conclude the district court did not abuse its discretion in denying the motion to recuse itself.

V.

Finally, plaintiff argues that the court erred in granting the individual defendants, Garland, Floyd and Cox, qualified immunity from civil damages on the retaliatory discharge claim because "public officials could resonably have disagreed over whether plaintiff's 'expressions of concern' were protected by the First Amendment."

Prior to trial, the court granted qualified immunity to Garland, Floyd and Cox for civil damages arising from plaintiff's free speech retaliatory discharge claim but held that the claim remained viable since plaintiff also requested he be reinstated as dean. Since we upheld the district court's finding that the individual defendants did not remove plaintiff as dean due to plaintiff's

exercise of his first amendment right and since plaintiff's request for civil damages arises from the same claim, we need not address this issue.

However, based upon the nature of plaintiff's comments as discussed in II infra, we conclude that reasonably competent officials could have disagreed on whether and to what extend plaintiff's comments were protected by the first amendment. Garvie v. Jackson, 845 F.2d 647, 650 (6th Cir. 1988). Moreover, contrary to plaintiff's assertion, whether qualified immunity attaches is a question of law to be decided by the trial court before trial. Id. at 649. Thus, the trial court correctly decided the issue of qualified immunity prior to trial.

For the reasons set forth above, we AFFIRM the judgment of the district court dismissing plaintiff's claims.

APPENDIX B.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EDWARD I. ISIBOR,

Plaintiff,

CIVIL CASE NO. 3-87-0669

October 6, 1988
Nashville,

v.

BOARD OF REGENTS OF THE
STATE UNIVERSITY AND
COMMUNITY COLLEGE SYSTEM
OF THE STATE OF TENNESSEE,
et al.,

Defendants.

TRANSCRIPT OF RULING
BEFORE THE HONORABLE THOMAS A. WISEMAN, JR.

APPERANCES,

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Nashville, Tn. 37203

THE COURT: All right. First, as to the Title 7 claim.

Plaintiff alleges that he was paid less than his counterparts at Memphis State and Tennessee Tech on account of his race or national origin. This presents a disparate treatment claim. It's controlled by the McDonnel-Douglas case and the Burdine case.

Plaintiff bears the burden of proof that he was the victim of intentional discrimination.

As you pointed out, Mr. Booker, there is no dispute as to the essential elements of a prima facie case.

Upon the presentation of a prima facie case, the defendant must articulate legitimate nondiscriminatory reasons for its action. Once articulated, the burden of going forward shifts back to the plaintiff to show by a preponderance of the evidence that the proffered reasons are pretextual.

The defendants' articulated reason, one reason articulated by the defendants, is that

the engineering program at Tennessee State is smaller, less complex than those at Tennessee Tech and Memphis State. The proof bears this out.

The TSU engineering major full-time equivalent is approximately half that of Memphis State, and roughly a third that of Tennessee Tech Engineering degrees, Tennessee State is approximately one-fourth of Memphis State and one-fifth that of Tennessee Tech.

Engineering faculty, less than half of either of the other two counterparts.

Dr. Nicks' testimony was that this was a factor in the calculus. The plaintiff's evidence to demonstrate that this was pretextual was that although the engineering program at Tennessee Tech was the largest, the Memphis State dean's salary in at least one year was higher.

The response to that, of course, by Mr. Vaden was that because of changing enrollments and the fact that fee revenues were allowed

to be setting salaries, there was a larger pool of funds available for salaries at Memphis State than at TSU. This is a logical explanation.

Of course, the differences in the programs are not reflected across the board. The associate dean at Tennessee State earned more than the associate dean at Memphis State for all these years.

Mr. Vaden's response to that, that such a variance is not surprising in that job descriptions differ from school to school.

To sum it up, the defendants have demonstrated that the general pattern of paying a TSU dean less is not an indicator of any bad faith on their part. Rather, given the relative sizes of the schools and the size and complexity of the respective programs, the differences are quite understandable.

And there is the further element in this respect that there was a serious overstaffing problem at Tennessee State which

made for a smaller pool from which salaries could be paid. Well, in short, it appears that Tennessee State was being funded at an even higher rate per full-time equivalent student than other universities in the Board of Regent system. But they were overstaffed with both faculty and staff, and this resulted in a smaller pool from which salaries could be paid.

A second articulated reason by the defendants is that the general policy throughout the Regent schools is that the dean's salary should not exceed the president's salary. There are three exceptions to this, of course, law deans, medicine deans, and one year, the engineering dean at Tennessee Tech.

Of course, the market place determines the price that must be paid for the dean of the law school, the dean of the medical school, and the explanation of the other exception, that is that the one year at Tennessee Tech was that there was an interim president, and

this, the Court finds to be reasonable.

The additional articulated reason by the defendants is that the $1,084 of increase recommended for the year 1985-86 was not approved because it was withdrawn upon subsequent review by President Peterson. This is supported by Chancellor Nicks' testimony, Mr. Vaden's testimony, and the testimony of former President Humphries, also testifying that the equity adjustment was submitted as he walked out the door, almost as an afterthought.

The fact that Board re-referred this for the recommendation of Interim President Peterson and Interim President Peterson's review and not recommending it is not pretextual but has merit. He did it along with four others and there is no evidence it was done for an improper motive.

On the Title 7 claim, the Court finds that the plaintiff has failed to carry the burden of persuasion that the articulated reasons of the defendants were pretextual.

Therefore, Title 7 claim will be dismissed.

The Court also denies the motion to amend the Title 7 claim to include the extra service pay request.

Now, on the termination as dean. Here, the plaintiff alleges that he was terminated as dean in retaliation for exercising his First Amendment right of free speech.

Now, the damage claims, of course, were dismissed earlier in the motion for summary judgment on the grounds of qualified immunity. So the only claim before the Court now is the one for reinstatement.

The general approach and the role of this Court is spelled out in the case of Anderson versus Evans, a Sixth Circuit case found in 660 Federal Second. There, the Court said, the role of Federal Courts in actions by teachers and other public employees against their state and local employers is a limited one. The sole function of the Federal Court in such litigation is to provide remedial action where constitutional violations by

public employers are established.

Thus, of course, the role is not to look over the shoulders of Tennessee State University officials to determine whether their decision to remove Dr. Isibor as dean was fair, correct, was reasonable, rather, the role is to determine whether or not the plaintiff's constitutional right of free speech has been violated, and if it has, to provide a remedy.

This is, even if a dismissal appears to some to be unfair or mistaken, that doesn't provide a basis for review of this court. The University has the right to choose its dean. Dean Isibor has no property right in being dean. He has no tenure in being dean. It's the University's decision to make unless it makes it for a constitutionally prohibited reason, that is, a violation of Dr. Isibor's First Amendment rights.

Now, in determining whether Dr. Isibor's right of free speech has been violated, the Court's analysis is guided by the Pickering

case of the United States Supreme Court, Connick case, Mount Healthy, and the Anderson versus Evans case.

There are four elements to this cause of action:

First of all, the plaintiff must demonstrate that the matters on which his speech was addressed were matters of public concern. Now, if he's successful in doing this, the next thing that must happen is that the Court must balance the interest of the plaintiff as a citizen in commenting on matters of public concern against the interest of the defendant public employer in promoting the efficiency of public services it performs through its employees.

If the plaintiff's interest outweighs the defendant's, then in that event, the plaintiff must then prove that his protected speech was a --- there must be a causation factor. He must prove that his protected speech was substantial or motivating factor in the alleged retaliatory action.

Now, the fourth element after that is that the defendant then has an opportunity to prove that it would have reached the same decision even without the protected conduct.

So, if the plaintiff failed on any one of the first three prongs, that is, public concern, the balance test and that is was --- there was a casual relationship, if he fails on any one of those three, he loses.

If the defendant prevails by a preponderance of the evidence on the fourth factor, that is, that they would have done it anyhow, regardless of this, then the plaintiff also loses.

Well, looking first at the first element, that is, whether or not the speech involved public concern. This must be determined by looking at the content of the speech, the form of the speech, the context of the statements in which the statements were made as revealed by the whole record before the Court.

Now, this whole record before the Court reveals that Dr. Isibor was, in fact, outspoken

on many matters, some of which, at least in part, were matters of public concern. On the million dollar investment, the testimony of Dr. Isibor, Greg Carr, Elizabeth Wayte, Mr. Ronnie Smith indicated that money problems at TSU were so bad that teachers could not even get chalk according to them. There's other testimony, of course, that nobody ever asked for chalk. I credit the testimony that there were money problems.

And while this was going on, the million dollar investment problem come to light. At least at that time, concerns about the investment were public concerns. They were addressed to management of public funds which at least arguably directly affected the State's ability to educate the young adults.

On the conflict of interest problems, questioning the objectivity of persons moved into the financial affairs office from the Board of Regents and from the State Comptroller's office. In light of Tennessee State's history of financial problems, it

may have been reasonable for Dr. Isibor to be concerned about whether the new persons would be held properly accountable for their activities.

Again, Ms. Wayte testified that when she expressed concern about apparent irregularities in computer purchases to Mr. Greathouse, that Mr. Greathouse said that he would go to the wall for the financial officer who was ultimately responsible, that is, Mr. Dickson. Without regard to-- I held that to be hearsay, but I'm taking it into consideration; because she relayed that to Dr. Isibor, I'm taking it into consideration in terms of his state of mind.

On the hiring practices at Tennessee State, the conflict of interest problems noted in the previous statements, concern about the advertising, the potential patronage issue involved in the athletic director hiring, vice-president of academic affairs, letter from the Rainbow Coalition, testimony of Mr. Ronnie Smith might fairly be

characterized as matters of public concern.

However, ruling that Dr. Isibor's speech, at least in part, addressed matters of public concern in no way is the Court ruling that Dr. Isibor's allegations are true. It's a very generous characterization in some of the instances to say they were matters of public concern. In many instances, his outspokenness merely expressed what I would call an employee beef, a belief that the people above him who were making certain decisions which affected him were incompetent.

Dr. Isibor often took his beef one step further, he charged not only that they were incompetent, the people with whom he disagreed, but he accused them of being dishonest, particularly I refer to Exhibit 102, the letter to Ms. Wilkison which was libelous, to say the least.

The court specifically does not credit the truth of these allegations. Not only has anyone failed to prove or produce any

evidence of dishonesty on the part of anybody there, but also, Dr. Isibor resorted to the same tatics in this courtroom that anybody who disagreed with is view of the testimony, he said they were lying or it was an outright falsehood, or implied that they were dishonest.

Dr. Isibor's charges that persons were incompetent or dishonest do not appear from the record to address the issues of public concern.

On the other hand, it is difficult to parse those statements that were of public concern from those that were not.

So the Court will proceed to the balancing test. In here, the Court must look to a particularized balance, to look at the whole record, including the context, the time, the place, the manner of the statements that were made and the effect or the perceived effect that the statements would have on the University's ability to fulfill its educational mission.

In Exhibit 102, for instance, the letter to Ms. Wilkison, Dr. Isibor accused the University administration of illegal hiring practices that remind, quote, one of some type of criminal network is designed to usurp the control of the financial resources of the University. He further insinuated that Ms. Wilkison and the administration were dishonest. He said in the same letter, I hope you and your friends will also be reminded that you should not be members of any scheme designed to siphon taxpapers' funds entrusted to our State institutions into the pockets of some unscrupulous individuals who have no integrity. The State already has enough people in prison. Those who have not been caught yet should change their ways and not continue to press their luck.

This wholly irresponsible letter has absolutely no basis in fact. It was written, as suggested by Mr. Himmelreich, the best

defense is a good offense. It was written at the time that his overexpenditure of the GE grant had been criticized.

He continued to ask questions concerning the GE grant that a Ph.D. should have known better than to ask. For instance, he continually asked where the money came from. And who authorized the overexpenditure. It appears to the Court that the overexpenditure resulted from requistions originating in the office of Dr. Isibor himself.

Any knowledge of accounting principles would answer the question of where the money came from. There was an account receivable, the GE grant against which requisitions could be made. There was no separate port for this or any other account on the books of the University. The receivable on the books at TSU and against which the requisitions were made were paid from cash flow but the receivable never came in because Dr. Isibor accomplished diversion of the receivable from TSU to the TSU Foundation.

Dr. Isibor made requisitions and expenditures then against both of them. He well knew the answer to the question he continued to ask or he should have known the answer because he caused the problem himself.

Indeed, Dr. Isibor's continual questions and accusations appeared to have been designed simply to undermine the credibility of the million dollar investment also reflect both an obdurate refusal to look at facts presented to him and an attack again on the offense upon the integrity of Mr. Ron Dickson, a person whose appointment Dr. Isibor used as an example of conflict of interest hiring problem.

Testimony of Mr. Garland, Ron Dickson, Dr. Floyd indicates that problems had been fully explained and that steps were taken to prevent future recurrence, and that the money had been or was about to be recovered, eventually was fully recovered.

Dr. Isibor's questions about reallocation of funds away from engineering building,

although Dr. Isibor insisted that Ron Dickson, quote, diverted the money from the project, Carl Norman Johnson's affidavit clearly indicates that no money was diverted, rather, the engineering school received almost $200,000 more money for equipment authorized by the Building Commission than they were originally slated to receive.

To recap thus far, Dr. Isibor's comments may have touched upon matters of public concern insofar as they were related to management of public funds and preserving the systemic integrity of the State education system. However, the record demonstrates first, Dr. Isibor persisted in dogging issues with little regard for the answers he received or for the facts. He pursued stale issues and ignored the facts.

2. Dr. Isibor's comments were often made as aggressive responses to criticisms of him.

3. Dr. Isibor made persistent and unfounded attacks on the personal integrity

of employees with whom he had to deal on a regular, daily basis. Dr. Isibor's comments undercut the level of trust between his school of engineering and other parts of the University administration.

For instance, Mr. Dickson testified his office had greater difficulty dealing with other parts of the University because Dr. Isibor had reduced the level of trust persons had in the financial affairs office.

Dr. Cox testified that Dr. Isibor would not meet with him without a witness or a tape recorder.

These factors together suggest that even if Dr. Isibor were dismissed for speaking out, TSU's interest in efficiently fulfilling its education mission outweighed Dr. Isibor's interest in making such statements, irresponsible as they were.

Another factor weighing in favor of the University. There was a change in administration, both the chancellor and the president. Dr. Floyd, Mr. Garland testified

to their concerns about image problems at TSU, their desire to improve the image of the University and the quality of education at the University, to achieve the goals that they had they need personnel who demonstrate loyalty and willingness to cooperate with their plans. This is especially so with high level administrators who set policies and often speak on behalf of the school. This is their right.

Testimony indicates that Dr. Cox was fully aware of Dr. Isibor's history of impugning integrity of the person with whom he disagreed and of his unwillingness to cooperate with his superiors.

For instance, you would note the criticism of Dr. Peterson that he was footdragging on the part of Dr. Isibor in efforts to develop joint programs and, of course, the problems with Dr. Cox.

Also in light of Dr. Isibor's accusations against persons in his letter to Dr. Floyd, although wishing Dr. Floyd success under

certain conditions, was not necessarily reassuring to Dr. Floyd.

Thus, as new leadership came on board, there was an interest in putting together a successful team of administrators. This weighed heavily in favor of TSU in the Pickering balance.

Finally, the third element and that is on causation. On the basis of the above, It is apparent that the plaintiff's constitutional rights of free speech was not infringed by his termination. Tennessee State's interest in officially fulfilling its educational mission outweighed Dr. Isibor's interest in speaking out.

Alternatively, even if the balance came out differently, the termination was justified.

Finally, the defendant had satisfied the Court that the plaintiff would have been terminated, perhaps should have been terminated even absent his protected conduct.

The rationale for this kind of decisions

is spelled out in Mount Healthy, the Supreme Court decision which held as follows:

> A rule of causation which focuses solely on whether protected conduct played a substantial or otherwise part in a decision not to rehire could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.
>
> The difficulty with such a rule is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire and does, indeed, play a part in that decision. Even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse position than if he had not engaged in the conduct.

A borderline or marginal candidate should not have the employment question

resolved against him because of constutionally protected conduct, but that same candidate ought not to be able by engaging in such conduct to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record simply because a protected conduct makes the employer more certain of the correctness of its decision.

The proof in this case demonstrates that although Dr. Isibor had a knack for public relations when it came to touting his notable achievements at the school of engineering, he had serious difficulties in getting along with people. He had serious people problems. The testimony of witnesses who were sympathetic to Dr. Isibor repeatedly described him as a perfectionist who expected high standards of others, perfectionist or not, the proof demonstrates that he abused many of his employees, calling them stupid, shouting at them, shaking his finger in their faces, generally treating them in a disrespectful

manner.

These were not isolated instances of the loss of temper, but rather it comes through loud and clear to this Court from many witnesses that this was his normal court of conduct. This conduct might reasonably be considered by man, including the Court, to be intemperate, overbearing an inconsiderate.

The Court has observed the manner and demeanor of the many witnesses, although the Court acknowledges and credits the testimony of witnesses who stated that they did not think that Dr. Isibor mistreated his employees, it also credits the accounts of the various instances of mistreatment which were related; specifically the testimony of Ms. Della Bradley, Ms. Evelyn Hadley, Mr. Vincent Mitchell, Ms. Cynthia Waller and Ms. Betty Washington.

Toward the faculty of the school of engineering, Dr. Isibor's approach was demeaning, bullying and unprofessional. Here, the Court credits the testimony of Associate Dean

Malkani, Dr. Clark, both called as witnesses by the plaintiff himself, as well as the testimony of Mr. Vincent Mitchell, Mr. Walter Vincent, and Mr. Maxwell Haley.

Toward his superiors in the University administration, Dr. Isibor's attitude and conduct was insubordinate and unprofessional. As noted earlier, his response to any criticism was to go on the attack and attempt to intimidate. Even former President Humphries, who tried to be as favorable to to Dr. Isibor as he honestly could be, said Dr. Isibor came across brashly in his choice of words.

The incident with President Peterson in the cafeteria was wholly inappropriate and would have constitute gounds for discharge for insubordination if President Peterson had been other -- anything other than an interim president.

Dr. Isibor's conduct toward his superiors Dr. Crowell, Dr. Cox. and Dr. Burger, when these persons were vice-presidents for

academic affairs, and his refusal to attend Dean's Council meetings indicated a belief that he was untouchable and above the normal rule of conduct reasonably expected of a dean, a faculty member, or any other person in public or private employ.

Here, the Court credits the testimony of Dr. Peterson, Dr. George Cox, Ms. Jewel Brazleton, Mr. Ron Dickson, Dr. Otis Floyd, and Dr. Roberts. This is further demonstrated by the unfounded accusations and letters noted earlier.

It is apparent from this pattern of behavior that this was also in Dr. Cox's mind when he recommended removal of Dr. Isibor as Dean. Evidence is strong enough to convince this Court that even if Dr. Isibor had not been outspoken on matters of public concern, he would have been terminated as dean.

Now, then, as to the extra service pay claim. Dr. Isibor alleges that he was denied payment of an extra service pay request.

Now, first as to prong one. Was

protected conduct a substantial or motivating factor in the denial? Note here the plaintiff bears the burden of proof. The burden of persuasion, the risk of non-persuasions rests upon the plaintiff.

Plaintiff's evidence here through the testimony of Dr. Isibor, Dr. Clark, Dr. Cox. Dr. Vincent and Dr. Floyd. In Exhibit 12 and 43, the plaintiff has shown that he was twice paid for work performed. The first payment was recommended October 1st, 1986 by Dr. Cox; the second was paid on February 13, 1987.

The first payment was for work done under the original grant in which Dr. Isibor was not named. The second was for work done under the renewal grant in which he was named.

He was not paid for his third request, Although Dr. Cox testified that the request submitted under EI International alterted him to a potential problem because he thought it was the plaintiff's company. Exhibit 43 shows that the second payment request was also submitted by EI International, as well, but

payment was made.

Also, Dr. Isibor had been told -- had been told by the principal investigators to submit the third request in that fashion.

Now, Exhibit 13, 14, 15, 17, 31, and the testimony of Dr. Cox, Dr. Clark, Dr. Isibor, Dr. Risby indicate that the procedural error was remedied and that Dr. Cox took the third request under consideration but denied the claim in August 1987, after Dr. Isibor had been terminated as dean. This is the plaintiff's proof.

Now, from this, the plaintiff wishes us to infer from the timing of this denial that this departure from the past conduct of two previous payments that the defendants acted in bad faith or to retaliate against Dr. Isibor for speaking out.

We turn now, then, to the defendants' evidence and looking to the whole of the evidence on the question of whether or not the plaintiff has carried the burden of showing the causation factor.

The concern of everyone in this matter comes through about a dean whose responsibility includes supervising grant work, that same dean performing work on a grant under -- himself under the supervisions of persons that he normally supervises. This was plainly expressed by Dr. Cox, by Dr. Floyd and by Dr. Risby, and was suggested in a letter from Susan Short Jones to Henry Haile, borne out by the testimonies of Dr. Clark and Dr. Vincent. Both of them testified that Dr. Isibor worked on the grant because he told them he would, not because he had any special expertise or because they needed him.

Dr. Clark said he wasn't put on because he was needed, he was put on because he said he was going to be on. He was put on because he was the boss because he wanted a piece of the action. That rang true to the Court and the Court looked at Dr. Clark as she said that. I believed her.

In this regard, the testimony of Dr. Clark and Dr. Vincent is more credible, Dr.

Vincent, than documents entered in which they requested payment for Dr. Isibor. Both Dr. Clark and Dr. Vincent testified they were urged by their dean to include him and to get him paid.

Of course, Dr. Clark and Dr. Vincent felt pressure and this is especially cogent in light of all the testimony about how other employees were treated by Dr. Isibor.

Through the testimony of Dr. Risby and Dr. Clark before the denial of the third request, the defendants had indicated a concern about a conflict between paying Dr. Isibor for consulting work on this grant and the principles outlined in the OMB circular 821., Exhibit 67. This reads, quote, since intra-University consulting is assumed to be undertaken as a University obligation requiring no compensation in addition to full-time base salary, only in unusual cases where consultation is across departmental lines or involves a separate or remote operation and the work performed by the

consultant is in addition to his regular department load, extra pay is allowable, providing that such consulting arrangments are specifically provided for in the agreement or approved in writing by the sponsoring agency.

Now, of course, this concern is not expressed until Dr. Risby's memo but before the request was denied. Plaintiff, of course, suggests that this timing demonstrates a pretext.

In the meantime, of course, there had been a change of administration. Dr. Floyd became interim president duly appointed, subsequently became president. This progression occurred during the sequence of decisions on this issue. General concern about the use of research grant funds was extant, Dr. Risby was charged with tightening up procedures, these procedures were being tightened up generally and gradually. Specific concern was expressed about payment to Dr. Isibor early in the sequence. The

conflict problems were instigated to some extent as the first payment was made, but Dr. Isibor had taken a leave of absence and nevertheless, Dr. Cox, Dr. Floyd and Dr. Risby all testified that they were concerned about the problems inherent in Dr. Isibor receiving payment under this grant. They also testified that they expressed these concerns to each other, to the principal investigators themselves, and to Dr. Isibor, suggesting that it shouldn't be done again at one point.

As Dr. Floyd settled in and as Dr. Risby fulfilled his task and tightened up the procedures, the administration made a legitimate decision to break away from pass practice of paying Dr. Isibor on the grant, not because of his outspokenness, but because he finally concluded that the payments were improper.

Whether or not the payments were improper, this Court is not called upon to decide. This Court is called upon to decide whether or not

the refusal to pay, the denial of the payment was motivated by a constitutionally prohibitive reason. In this respect, the Court denies the motion to amend to allege a pendent State claim. It declines pendent jurisdiction in this case. There are Eleventh Amendment problems and other matters involved in that that this Court does not see the need to get into when it is properly a matter that could be considered by another Court.

For all the foregoing reasons, the Court finds that all the plaintiff's claims are without merit, dismisses them all and grants judgment to the defendant with its reasonable costs.

Case will be dismissed. Court will be in recess.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

EDWARD I. ISIBOR	)	
	)	
v.	)	NO. 3-87-0669
	)	
THE BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, et al.	)	

ORDER

Upon consideration of the complaint, the responses thereto and the entire file, the Court finds the orders:

1. Defendant, Roy S. Nicks, is dismissed as a defendant in his individual capacity. He shall remain a defendant in his official capacity.

2. Defendants have moved for summary judgment in favor of the Board of Regents on plaintiff's salary discrimination claim under Title VII. The motion is denied.

3. Defendants have also moved to dismiss and/or for summary judgment in favor of

defendants Thomas Garland, Otis L. Floyd, Jr. and George W. Cox on several grounds. The portion of their motion which asserts that defendants Garland, Floyd and Cox are entitled to qualified immunity from civil damages under 42 U.S.C § 1983 is granted. Because plaintiff also seeks injunctive relief, however, Messrs. Garland, Floyd and Cox shall remain as defendants to plaintiff's second cause of action.

4. The portion of defendants' motion for summary judgment asserting that plaintiff's dismissal as Dean did not deprive him of a constitutionally-protected liberty or property interest is granted.

5. Because there is no genuine issue of material fact as to whether defendant Garland was personally involved in refusing plaintiff's extra service pay request, he is entitled to summary judgment on that issue. Accordingly, he is dismissed as a defendant to plaintiff's third cause of action.

6. The remaining portions of defendants'

motions to dismiss and/or for summary judgment are denied.

The accompany Memorandum sets forth the Court's reasons for the above findings and orders. Furthermore, this Order and the Pretrial Order filed June 15, 1988, have rendered moot the remaining pending motions. Accordingly, they are denied.

THOMAS A. WISEMAN, JR.
CHIEF JUDGE

APPENDIX D

TSU SCHOOL OF

ENGINEERING AND TECHNOLOGY

TENNESSEE STATE UNIVERSITY

3500 JOHN A. MERRITT BLVD.

NASHVILLE, TN. 37203

AUGUST 14, 1984

OFFICE OF THE DEAN

Dr. Roy Nicks, Chancellor

State Board of Regents System

Murfreesboro Road

Nashville, Tennessee 37217

Dear Chancellor Nicks:

This letter is to share with you some rumors that I have heard regarding your involvement with other individuals in a continuous effort to harass me and members of my staff. It has been said that you and your staff have worked through various individuals (faculty, administrators, students) at TSU and former UTN in a constant attempt to generate discord within my administration at the TSU School of Engineering and Technology.

These rumors have been partially reinforced by statements from Mr. Jessie McDonald, a former inmate at the Tennessee State Prison, who is presently enrolled as a student in the Dept. of Civil Engineering. In a discussion with me several months ago in my office, Mr. McDonald informed me that he had been hired by some top officials in higher education to harass me by filing a continuous stream of lawsuits against me. Mr. McDonald also informed me at this meeting, and in the presence of another individual, that a member of your staff, had contacted him to generate some derogatory situations against a member of our faculty and Head of the Department of Civil Engineering, so as to deny his confirmation as a tenured member of our faculty. Mr. McDonald stated that he had refused to do this because he considered such actions to be improper. At a subsequent meeting, Mr. McDonald informed me

that these "Top Officials" were powerful enough to see that the court against me could be heard by a judge of their choice.

Dr. Nicks, it is becoming increasingly difficult for me to convince my faculty members that these are nothing but rumors and are not based on truths. I feel that a statement coming from you indicating your support of the School's administration would be very helpful to me in my efforts to quench these rumors and restore a more positive attitude among the faculty personnel.

I hope to share your response to this letter with the faculty during one of the sessions of the Faculty Institute scheduled for August 20, 1984. I would appreciate receiving your response before this date.

With kind regards.

Sincerely,

Dr. Edward I. Isibor
Dean

kl

APPENDIX E

TSU SCHOOL OF

ENGINEERING AND TECHNOLOGY

TENNESSEE STATE UNIVERSITY

3500 JOHN A. MERRITT BLVD.

NASHVILLE, TN. 37203

DECEMBER 15, 1986

OFFICE OF THE DEAN

Governor Ned McWherter

State Capitol

Nashville, Tn. 37219

Dear Governor McWherter:

On behalf of our students, faculty and staff, it gives me the greatest pleasure to congratulate you on our selection as the next Governor of the great State of Tennessee. Your victory answered the prayers of many of us here at Tennessee State University. Leaders of our Student Government Association took the unprecedented action of endorsing a candidacy. We wish you all of God's blessings as you face the task as our next leader.

I vividly recollect the day I visited your office in 1985 to have a one-to-one meeting with you and gain knowledge of your personal views of the direction Tennessee State University should be following to meet the expectations of the community as a comprehensive, urban university. I recollect that both of us ended the meeting by wishing each other good luck in our various aspirations.

Today, you have a unique opportunity to make plans for accomplishing the dreams you expressed during the campaign. You promised all Tennesseans that "The Best is Yet to Come." This goal is similar to the one I have established since my appointment as the Dean of the School of Engineering and Technology at Tennessee State University. I always preach to my students and staff to "strive to better tomorrow the best of today." With the passion for excellence that I try to project, we were indeed honored when in 1980

our School of Engineering and Technology brought the first national engineering award to the State of Tennessee. We won the prestigious Koerper Award given by the National Society of Professional Engineers. As the head of the State Legislature, you honored us by passing a resolution to commend the School for this award. I pledge to continue to work harder to improve the status of the engineering programs at Tennessee State University.

I also feel obligated as one of your friends to bring to your attention some "smoke" in higher education in the State Of Tennessee that needs to be put out before it becomes a major disaster.

In 1985, I brought to the attention of Governor Lamar Alexander and the State Board of Regents some allegations of some impropriety in the relationship between the Office of Vice President for Fiscal Affairs at Tennessee State University, the State Board of Regents Staff, and the

State Comptroller's Office. Unfortunately my call for action did not receive the attention it deserved. About two months later, an intergovernmental agency came to town to review the Office of the State Comproller and declared in its final report that the State Comptroller Office violates the conflict of interest rule in its relationship with other state agencies.

This charge of conflict of interest directly confirms the charge I made with other information some two months earlier. This situation is having a destructive impact on the operation of Tennessee State University as oneof the state institutions of higher learning. It has led campus morale to a very low ebb. This is because everyone feels powerless to do anything about this conflict-of-interest problem. The center of controversy in this regard is Mr. Ron Dickson, a former member of the staff of the State Board of Regents, who was brought to the campus with a B.S.

degree and made the Vice President for Fiscal Affairs without giving other candidates an opportunity to apply. He was also given full authority to hire new personnel without going through the regular hiring process of the University. Therefore, he chose to hire other State Board of Regents staff members and some personnel from the State Comptroller's Office. This hiring practice has created an impairment of independence in the audit report submitted annually by the State Comptroller's Office on Tennessee State University. Under Ron Dickson's Administration, Tennessee State University has lost a substantial sum of money. Yet, the annual audit report from the State Comptroller's Office and Mr. Jim Vaden of the State Board of Regents continue to praise him.

To the contrary, a review of the audit report of Tennessee State University, under his administration, will show some serious irregularities that have not been

addressed. In the 1984 Audit Report it was stated that "Tennessee State University commission for video games receipts during fiscal year 1983-84 was to be 50%, but Tennessee State University received only 15% of video game receipts.. The failure to properly monitor the contract terms has resulted in the loss of revenue to the University." Despite this finding, the University did nothing to collect the 35% that was lost from these video game receipts. Instead, the Vice President for Fiscal Affairs renewed the contract of the vendor for food service. In the following year, the audit report for the 1984-85 fiscal year reported that the "Vending machine contractors did not always remit to Tennessee State University Commissions based on the percentages stated in the contract." Again, the audit report concluded that "The University's failure to properly monitor the contract terms resulted in a loss of

revenue."

More importantly, it was brought to the attention of the general public that in August 1985, one million dollars of Tennessee State University's funds were inappropriately invested in a U.S. Treasury Note through Brittenum Associates, Inc., a Little Rock, Arkansas brokerage House. This investment, accord-to the Tennessean article of December 3, 1986,"Was not registered in Tennessee State University's name." The loss of University's funds in this manner coupled with the decline in student enrollment, has led the University to take various drastic measures to reduce personnel positions at the University. Yet, no action is being taken by the University administration or the State Board of Regents to demand accountability and to address the mismanagement of University funds by the Office of the Vice President for Fiscal Affairs.

As a taxpayer in the State of Tennessee and as an academic administrator, who takes an uncompromising stance on integrity, I have made many attempts to make my views known through the regular channels. Instead of addressing these problems, attempts have been made to harass me and keep me quiet on these issues.

Your election as our new Governor by the people of Tennessee gives me renewed hope that your administration, built on honesty and integrity, will do all it can to remove any suspicion of wrongdoing by high state officials. I strongly believe that you were elected because people feel that you are in the best position to bring honesty and integrity to the state government. I vow to stand behind you in assuring proper accountability and integrity in higher education sector of our state government.

I feel very confident that you have the potential to be the best Governor the State of Tennessee has ever had.

With best wishes.

Sincerely,

Dr. Edward I. Isibor

Dean

EII:lb

NASHVILLE BANNER

Thursday, January 9, 1986

AUDIT SAYS COMPTROLLER'S

POSTS POSE CONFLICT

BY MIKE PIGOTT

"It is a conflict of interest for State Comptroller William Snodgrass to sit on a number of state boards and commissions that are audited by his department, a team of inspectors has found.

The findings boil down to an audit of the state's auditors by experts from various Southern states.

Snodgrass said Wednesday he sees why auditors could be concerned about his service on boards, but he said his role as a watchdog on those panels should also be taken into consideration.

The findings by a team from the Southeastern Intergovernmental Audit Forum, a quasi-governmental agency, were published in an annual report of the State Department of Audit that was released

this week.

Prior quality assessments of the Tennessee Department of Audit reported that an organizational impairment of independence existed because the Comptroller of the Treasury sits on a number of state boards and commissions that are subject to audit by the Department of Audit." the team's report said.

"Our review indicated that this organizational impairment of independence still exists," the report said. "In addition, we noted that the comptroller of the treasury has administrative responsibility for the Tennessee State School Bond Authority, Local Development Authority and the Tennessee Board of Equalization Loan Fund.

"These entities are audited by the Department of Audit which is under the control of the Treasury," the report said. "We see this is an additional im-

pairment of independence."

Later in the report, the team said, "We recommend that the Comptroller of the Treasury work with the appropriate state authorities to eliminate the impairments to organizational independence."

Snodgrass, who has served as state comptroller since 1955, said he believes there is no way for any auditing organization to be completely independent.

He also said he has never tried to influence the outcome of any audit related to a board or commission on which he sits.

A copy of the audit was sent to House Speaker Ned Ray McWherter and Lt. Gov. John Wilder, who respective houses of the Legislature re-appoint the comptroller every two years.

Snodgrass said the results of the audit can be either acted upon or ignored by lawmakers.

Wilder today said, "I see no problem with him sitting on the boards, but I do

see the conflict.

"I guess if they (the auditors) say there is a conflict, we ought to take a look at it," the lieutenant governor said.

Wilder said he do not know of any occasion in which Snodgrass' membership on the boards and commissions had caused a problem."

STATE OF TENNESSEE

AUGUST 20, 1987 NED MCWHERTER

GOVERNOR

Dr. Edward I. Isibor
8220 Frontier Lane
Brentwood, Tn. 37027

Dear Dr. Isibor:

This is to acknowledge and thank you for your letter dated August 3.

I read the copy of your letter dated December 15, 1986, regarding Tennessee State University and regret that you never received a response to this letter. My Transition Office should have received it during the time between when

I was elected and sworn in as Governor. The letter was apparently misplaced and never brought to my attention.

Dr. Isibor, I assure you that as Governor, I am totally committed to doing everything I can to improve education on the TSU campus. I am dedicated to making TSU one of our top universities in the Board of Regents system.

We plan to ask for funding for capitol outlays on the campus. The request has been made that the planned building and construction projects immediately be put to contract. I plan to personally as an individual, help TSU with a commitment in the near future.

However, it is not my intent to get involved in TSU's administration and management. This is a responsibility of the Board of Regents and the Tennessee Higher Education Committee.

If you would like to meet with me to discuss these issues further, please con-

tact my Executive Assistant, Betty Haynes at 741-2001 for an appointment.

Sincerely,

Ned McWherter

/VP

APPENDIX F

EXCERPT FROM

NASHVILLE BANNER, TUESDAY, DECEMBER 12, 1989

GOVERNMENT MARKED BY SCANDALS DURING '80S

BY DONNA DAVIS

"The decade began with the Scandal of Gov. Ray Blanton's administration and concluded with a charity bingo probe and a wide-ranging federal investigation into alleged misuse of public funds by Davidson County Sheriff Fate Thomas."

"The ongoing Federal and State investigation, codenamed "Rocky Top," has uncovered evidence of bribes, fraud, conspiracy and gambling violations among lobbyists and legislators, public officials and private businesspeople."

"So far, 23 people have been indicted as part of the probe, including State Rep. Tommy Burnett, D-Jamestown, who spent 10 months in a federal prison in 1984 for failing to file income tax returns."

EXCERPT FROM

NASHVILLE BANNER TUESDAY, MARCH 6, 1990

CORRUPTION SCANDALS ARE EMBRASSING

TO TENNESSEANS

BY

M. LEE SMITH

"Rocky Top has underscored the severity of pubic corruption in Tennessee at the highest levels of state government. Revelations growing out of the problem have been an embarrassment to the State."

"In Memphis, Democratic U.S. Rep. Harold Ford is on trial on charges of bank fraud. Prior to 1983 Ford received $1.5 million in loans from banks owned by Jake and C. H. Butcher, Jr. which the government contends were, in reality, gifts to the Congressman in exchange for political favors."

Meanwhile in Nashville, Davidson County, Sheriff Fate Thomas, a powerhouse in local Democratic politics, is scheduled to go on trial July 23 on 38

separate counts of Federal racketeering. Among other allegations, using public funds to renovate his personal properties, and intermingling public money with his private business and political activities."

EXCERPTS FROM NASHVILLE BANNER

OF DEC. 14, 1989

GRAND JURY INVESTIGATES DEMOCRATIC FUND-RAISING

BY

J. PATRICK WILLARD AND DONNA DAVIS

"Three top Democrats quizzed in the Rocky Top corruption probe were soliciting political contributions from engineers and architects at the same time they held the controlling votes on the board that awarded state building contracts.

The contributions were solicited by the Tennessee Legislative Fund - a political action committee created by Secretary of State Gentry Crowell, Deputy Governor Harlan Matthews and State Comptroller William Snodgrass."

"Crowell, Matthews and Snodgrass served on the Building Commission together in the early 1980s, along with then Gov. Lamar Alexander, his Commissioner of

Finance and Administration, then House Speaker Ned McWherter and Lt. Gov. John Wilder."

APPENDIX G

EXCERPT FROM THE NASHVILLE BANNER

OF JANUARY 24, 1990

OLD PALS URGED TO AID THOMAS

Dying Lobbist's Last Words: "Help Fate"

BY

Kathleen Gallagher and Tom Gordon

"An old Nashville political network that gathered Tuesday night to remember a departed friend was urged to rally around another of their pals - beleaguered Sheriff Fate Thomas."

"The same closely knit group is tied to the federal probe of Thomas through an explanation of how Thomas may have learned he was under investigation for bribery."

"According to sources, Thomas may have learned he was under investigation for the Bellevue matter after Hooker, who was employed by Freeman-Webb as a consultant, discussed the probe with Merritt.

Freeman-Webb partner, Bill Freeman was working with federal agents. Merritt

talked to Seigenthaler, who talked to Willis, who talked to Thomas, sources said.

After the chain of discussions, Thomas wrote a letter in September 1988 opposing the shopping center project. It was hand-delivered to members of the Metro Council and the Metro Planning Commission."

Hooker

Merrill

Seigenthaler

Willis

Thomas

EXCERPT FROM NASHVILLE BANNER

HIGGINS NEXT IN LINE TO JUDGE

THOMAS CASE

BY

KATHLEEN GALLAGHER

"The trial of Sheriff Fate Thomas was to be reassigned to U.S. District Judge Thomas A. Higgins, a Republican, today after Nashville's other two federal judges - both Democratic appointees - recused themselves Monday.

Neither John Nixon nor Thomas A. Wiseman Jr., gave any written explanation for stepping aside from the case. Both had strong political ties before being appointed judges by President Jimmy Carter at the recommendation of Sen. Jim Sasser."

"Judges typically recuse themselves sua Sponte, or of their own accord, from cases involving former clients, law partners, family members or businesses in which they own an interest."

"Wiseman once ran for governor in 1974 finishing third behind Blanton and Jake Butcher for the Democratic nomination."

APPENDIX H

EXCERPT FROM THE TENNESSEAN

OF MARCH 3, 1990

TSU CAFTERIA'S TRACK RECORD

SPURS MORE INSPECTIONS

BY

SHELIA WISSNER

"The Metro Health Department plans to inspect Tennessee State University's cafeteria more often because of a multitude of health violations found during inspection this school year, an official said."

"Student protesters - who currently are on a hunger strike - complained about the cafeteria in a "manifesto" outlining deficiencies at the University they want corrected."

"The cafeteria received a score of 38 out of a possible 100 during the Sept. 9 inspection because of violations. He said a passing score is above 85."

"An inspection Feb. 1 turned up many of

the same violations again - improper food temperatures, dented cans, a broken back door, water standing on the floor, unsanitized utensils."

EXCERPT FROM THE NASHVILLE BANNER

OF FEBRUARY 21, 1990

TSU STUDENT SEIZE BUILDING

LONG LIST OF GRIPES SPURS SIT-IN

BY

KATHLEEN WILSON

"About 300 students staged a sit-in at Tennessee State University's administration building today to protest what they said is the administration's violation of their rights."

"Campus dorm conditions, better accounting for state funds and the resignations of several school officials were at the top of the students long list of complaints."

"Specifically, the students are asking for:

o. The resignation of Johnny Sheppard, Vice President of Student Affairs.

o. The resignation of Vaugh Little, Dean of Residence Life,

o. The resignation or termination of Robert Boone, an admissions official,

o. An effective and efficient shuttle bus schedule,

o. The repair and opening of all study rooms in TSU's dormitories,

o. Allocation of funds to purchase badly needed transmitters for TSU's radio station;

o. Adequate lighting on the campus and bridge so that, in Carr's word, "No one will be held up with a sawed-off shotgun";

o. An accounting of $141 million they say has been allocated to TSU;

Repair of hot water, blinking electricity, a leaking roof and a backed-up sink in Wilson Hall; non-working showers, in dormitories; and defunct elevators. Carr said he also wants an explanation of "maintenance" fees, which are the fees charged to in-state students at all state colleges, "seeing as we don't see anything being maintained."

EXCERPT FROM A COMMUNITY FORUM

ON

TENNESSEE STATE UNIVERSITY

"WHERE IS THE MONEY?"

The entire community

is invited to come out and

discuss these concerns.

Friday, March 23, 1990

7:00 p.m.

World Baptist Center

1620 Whites Creek Pk.

Nashville, Tn. 37207

CHURCH WOMEN ON COMMUNITY CONCERNS

EXCERPT FROM

THE TENNESSEAN

SATURDAY/MARCH 24, 1990

BY: CINDY ROLAND

FORUM RAISES QUESTIONS ON TSU FUNDING

Two state building officials explained a new master building plan for Tennessee State University to 150 people at a forum last night on whether TSU is adequately funded.

School administrators attending the meeting at the National Baptist World Center had little response to questions raised about whether TSU funds have been spent effectively.

Churchwomen on Community Concerns scheduled the forum to ask questions about whether TSU has received adquate state funding in the past and whether that money has been used effectively.

"Shoddy work and shoddy workmanship seems to be the common thread in the renovation of old buildings and the construction of new buildings on campuses of colleges and universities in the state of Tennessee," said Ron Smith, former president of the TSU Alumni Association.

Jerry Preston of the state's capitol pro-

jects management group, which oversees design and construction of state facilities, said he could not account for money or construction work at the campus before the state took control of new TSU projects in 1987.

I've got a knowledge that there has been some work in the past at TSU that has been shoddy," said Preston, noting that was one of the reasons his group has been asked to oversee the work.

But Smith complained that turning TSU building projects over to Preston's group for supervision by the state causes the University to lose autonomy and leave it in the state "political arena" with little control over its construction and maintenance problems.

School administrators had few immediate answers to the questions posed by the forum. Connie Nelson, Vice President for Business and Finances at TSU, invited those with questions about the school's finances to her office.

Jeff Car, President of the School's Student Government Association and leader of

the recent student sit-ins protesting building conditions on campus, said he has seen the master building plan for TSU in the past but still had questions about university funding.

APPENDIX I

STATE OF TENNESSEE

OFFICE OF THE ATTORNEY GENERAL

450 James Robertson Parkway

Nashville, Tennessee 37219-5025

HAND-DELIVERED

March 23, 1988

Mr. Cyrus Booker

Dearborn & Ewing

Attorneys at Law

One Commerce Place

Suite 1200

Nashville, Tennessee 37239

RE: Isibor v. State Board of Regents, et al. No. 30-87-0669 (M.D. Tenn.)

Dear Cyrus:

This letter will confirm your earlier conversation with Linda Ross in which she informed you that Mr. Brad Reed's office has told this office that he will not be available until after March 31, 1988. If you wish to make arrangements to depose Mr. Reed before then that is your concern. Mr. Reed is an employee of Tennessee

Higher Education Commission. Neither he nor the Commission are defendants in this case.

This will also confirm that Linda Ross has informed you that Mr. Frank Greathouse, of the Comptroller's Office, suffered a stroke in January 1988. He is not able to speak. Accordingly, this office has made no efforts to have Mr. Greathouse be available before March 31, 1988.

You refer to your letter of March 21, 1988 to the deposition of "Newspaper persons". It has never been my understanding that your client is interested in taking these depositions. I did mention that I might want to take the deposition of certain reporters. Subject to obtaining the necessary information on their present location and availability, I may wish to take such depositions, and therefore I request that you keep the afternoon of March 28, the day of March 29, and the afternoon of March 30 open for depositions.

With regard to Dr. Cox, he will be available for a deposition on his late filed exhibits on the afternoon of Monday, March 28, 1988, during all regular business hours on Tuesday, March 29, 1988 or the afternoon of Wednesday, March 30, 1988.

With regard to the late filed exhibits to Dr. Cox's deposition, our response is as follows:

7. Documents on the John Arthur lawsuit: Documents regarding this lawsuit were provided to you on March 14, 1988 when we deposed Mr. Lewis and Dr. Isibor.

12. A more recent non-instructional handbook than exhibit No. 10: I enclose the most recent handbook for non-instructional personnel. Since the handbook, at page ii, refers to Federick S. Humphries as the President of TSU, and since Dr. Humphries left TSU in 1987, it would probably be fair to assume that said handbook was in effect in May 1987.

13. Policy referred to by Dr. Cox on the difference between personnel action for cause and a personnel action not for cause: See exhibit No. 10, at Page 4. Also see Board Policies 5:01:00:00:00; at page 4, Policy 5:02:03:00, and Policy 5:02:03:10, and the other Board policies, which you have. There are no additional documents.

15. Documents on changes in status (demotions, changes for a fiscal year to an academic year, or changes from faculty to administrative) in the summer of 1987: The relevant documents, including personnel action request forms, are in the TSU personnel office in the custody of Margaret Wade. If you desire to inspect such documents, please let me know and these documents will be made available for your inspection at a mutually convenient time. Documents reflecting changes can be extracted from the mass of other personnel documents as easily by the plaintiff as by the defendant, and

therefore, I do not propose to either perform the extracting process or copy all of the voluminous documents for you.

17. Guideline No. P-110, "Non-Faculty Grievance Procedures", which was in effect in May, 1987: There was no guideline P-110 in existence prior to August 1987. However exhibit 12, the non-instructional handbook, contains, beginning at Page 23, procedures for filing a grievance. Note that P-110 is a guideline developed to assist universities in drafting their own procedures for addressing grievances.

19. Other incidents contributing to Dr. Cox's recommendation to remove plaintiff as Dean of the School of Engineering and Technology: Dr. Cox's perception of Dr. Isibor as an administrator was a factor. It is impossible to catalogue everything that contributed to that perception. The following incidents contributed to that perception:

a. Meeting in 1976 or 1977 of the President's Merger Advisory Committee at which Dr. Isibor displayed inappropriate behavior in response to Dr. Cox offering an opinion on something to do with the field of engineering.

b. Dean's council meetings from 1975 until approximately November, 1985 (after arrival of Dr. Burger):

(1) Plaintiff's loud fast speech during heated disagreements with Dr. Crowell. Sometimes plaintiff would disregard Dr. Crowell's request to modify his behavior.

(2) Plaintiff's intemperate attack on Evelyn Fancher.

(3) Plaintiff's excessive loudness at these meetings in general, including for example his loudness in presenting a proposed non-smoking rule.

c. Plaintiff's loudness during meetings in Dr. Crowell's office which was located near Dr. Cox's office.

d. Plaintiff's difficulties with instructional and non-instructional personnel:

(1) Yvonne Hodges

(2) Several clerical personnel who complained that Dr. Isibor had yelled at them, accused them of taking things from files, and accused them of incompetence.

(3) Employee who was alleged to have a gun in her pocket book.

(4) A number of former UTN engineering faculty who failed to come to TSU, or left soon thereafter, as a result of plaintiff.

(5) Plaintiff's pattern of generally making it difficult for independent-minded engineers to be on his faculty.

e. Disagreement over budget allocation and other issues concerning summer sessions, and Dr. Isibor's turning over of his responsibility to Dr. Malkani.

f. Plaintiff's treatment of Dr. Kumar.

g. Plaintiff's pattern of requiring

faculty to perform work at plaintiff's annual birthday party, and retaliation and unfair treatment to those individuals who refused to attend.

h. Plaintiff's pattern of obtaining only those grants which offered a substantial amount of money for the Dean's use as opposed to those grants which offered the bulk of the money for student scholarships, resulting in the loss of potential grant money. Related to this reason is the Atlanta University DOE grant, late filed exhibit no. 24 which was discussed at the deposition.

i. Plaintiff's pattern of going outside the University regardless of whether issues had already been fully aired and explained within the university, and of repeating the same accusations which had already been aired. For example:

(1) Plaintiff went outside the University on the issue of the name of the new engineering building after the

issue had already been decided by President Humphries.

(2) Plaintiff continued to raise the $59,000 issue, the One Million Dollar issue, the $200,000 issue (equipment) at informational meetings, during presidential search interviews, and at a spring faculty institute, after the accused officials had already provided explanations.

j. Plaintiff's having been put on probation by Mary Burger, and the circumstances surrounding probation.

The following incidents were previously discussed at the deposition:

k. Passing out the AIDS leaflet.

l. Refusing to yield the floor and move on to another issue during the Dean's meeting in January 1987.

m. Plaintiff's refusal to contine to attend Dean's Council Meetings.

n. Plaintiff's refusal to have meetings with Dr. Cox.

o. Plaintiff's participation in the grants which are the subject of the extra service pay claim.

p. Plaintiff's inappropriate behavior during the Dean's council meeting which discussed the staff reduction plan.

If I have failed to list above an incident which was already covered during the deposition, I am not signifying that Dr. Cox did not rely on that incident in making his recommendation or that the incident had no effect on Dr. Cox's perception of Dr. Isibor.

24. Documents on the 1982-83 DOE grant investigated by Cox and a request by Dr. Humphries in this regard: The files of the Vice-President for Academic Affairs do not contain these documents. Apparently said files are periodically purged, without reference to the pendency or non-pedency of lawsuits. The requested documents are not within my client's possession, custody, or control, and apparently

no longer exist.

25. OMB Circular: This ircular was provided to you on February 29, 1988 as paragraph 8 (a) in response to your letter of January 26, 1988.

26. Letter from Dr. Risby regarding Dr. Busby's request for payment on a DOE grant: I enclose a copy of an approval signed by Dr. Risby on April 30, 1987 in this regard. Although the document is in letter format, it obviously is not a letter since it is addressed to Dr. Risby and signed by Dr. Risby.

29. Name of the secretary who called Dr. Isibor's office in December 1986 and got the message that Isibor would require a written request for the meeting: Jewel Brazelton.

32. Dr. Cox's 1987 calendar used from October 1, 1987 through December 31, 1987: This document does not exist.

33. Notes on the meeting of May 7, 1987 with Dr. Bach, Susan Short, and Dr. Floyd: No such documents are in Dr. Cox's

possession, custody, or control.

Let me know when you want to depose Dr. Cox and I can arrange to have the Attorney General's conference room available.

Yours sincerely,

DAVID M. HIMMELREICH

Deputy Attorney General

DMH:dc

Enclosures

cc: Dr. George Cox

President Otis Floyd

Ms. Linda Ross

APPENDIX J.

EXCERPTS FROM THE

NASHVILLE BANNER, FRIDAY, MAY 17, 1985

CIVIC PETITION PUSHES

ISIBOR FOR TSU HEAD

More than 500 people have signed a petition endorsing Edward Isibor, Dean of the Engineering School at Tennessee State University, as TSU's next president.

The petition and letter were prepared by Nashville attorney Larry D. Woods and delivered to the office of State Board of Regents Chancellor Roy S. Nicks May 9.

Copies were also sent to the 18 members of the Regents board who will make the final decision about a new TSU President.

Some of those who have signed in support of Isibor's candidacy include J. William Denny, President of Nashville Gas Co.; Dr. David Satcher, President of Meharry Medical College; Sherman Nickens, Assistant Metro Police Chief; Tony Spratlin, Former TSU Student Government Association President;

Henry Hill, President of Citizens Bank; and Bill Calloway, Vice President for Public Relations at Service Merchandise.

Also signing were Bobby Jones, President of New Life Gospel Singers Inc.; T.B. Boyd III, President of the National Baptist Bublishing Board; Barry Oxford, President of Aladdin Resources; Richard Black, Chairman of the TSU Staff Senate; Nashville Attorney Russell B. Ennix; and Elizabeth Daniels, President of the Nashville Branch of the TSU Alumni Association.

The letter from Woods reportedly says the petitioners "strongly believe" that Isibor has the administrative and academic background as well as the "dynamism" that will project TSU to a new horizon of excellence.

Woods wrote that the signatures represent "Black, White and other ethnic members of the student, faculty and staff segments of Tennessee State University, TSU alumni and members of the general public."

This diversity of people, he said, shows that Isibor has behind him "a support base that can help unite the total community toward achieving the mission of TSU as set forth by the Board of Regents."

CERTIFICATE OF SERVICE

Edward I. Isibor, Pro Se, certifies that 3 true and correct copies of the foregoing petition for writ of certiorari are being mailed under U.S. Postal Certification with postage prepaid to Counsel for Defendants, Linda A. Ross, Charles W. Burson, David M. Himmelreich, Office of the Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025 and to William R. Willis Jr., Marrion F. Harrison, Willis and Knight, 215 Second Avenue North, Nashville, Tennessee 37201 on this 5th day of April 1990.

Edward I. Isibor

EDWARD I. ISIBOR
PRO SE
April 5, 1990